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In the Supreme Court of the United States

OCTOBER TERM, 1957

JOHN KASPER, PETITIONER

v.

D. J. BRITTAIN, JR., J. M. BURKHART, W. B. LEWALLEN, SIDNEY DAVIS, AND WALTER E. FISCHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. 2a–9a) has not yet been officially reported. The opinions of the District Court for the Eastern District of Tennessee (Appellant's App. 21a–29a; 31a–35a)[1] are also unreported.

[1] The designation "Appellant's App." refers to the petitioner's appendix filed in the Court of Appeals, "Appellees' App." refers to the respondents' appendix in the Court of Appeals, and "Pet. App." refers to the appendix to the petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1957 (Pet. App. 1a). A petition for rehearing was denied on June 27, 1957 (Pet. App. 9a). The petition for a writ of certiorari was filed on July 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Does the First Amendment bar a District Court from restraining inflammatory speeches intended to incite immediate mob action to frustrate a decree of the District Court ending racial discrimination in a public high school?

2. Does a District Court have jurisdiction to issue orders to restrain activity calculated to frustrate its decree ending racial discrimination in a public high school?

3. Were prejudicial errors committed during petitioner's trial for criminal contempt?

4. Did the District Court abuse its discretion by sentencing petitioner to one year in jail for his criminal contempt?

STATEMENT

The background:—On January 4, 1956, the District Court for the Eastern District of Tennessee issued an order in *McSwain, et al.* v. *Board of Education of Anderson County* (E. D., Tenn., No. 1555),[2] a suit by a group of Negroes for admission to the schools

[2] Respondents Brittain and Burkhart were named in this order; respondents Lewallen and Davis were attorneys for the school board.

of Anderson County, Tennessee, on a non-discriminatory basis, directing that desegregation begin in the high schools of Anderson County by the fall term, 1956 (Appellant's App. 22a–23a). The instant proceedings arise out of measures taken by the District Court to prevent interference with that order.

In obedience to the court's order, respondent Brittain, the principal of Clinton High School, registered several Negro students for the fall term, 1956; and when school opened on Wednesday, August 22, 1956, twelve Negroes and approximately 800 Caucasian students reported without incident (Appellant's App. 23a; Appellees' App. 7b–8b).

On Saturday, August 25, 1956, petitioner arrived in Clinton (Appellant's App. 23a; Appellees' App. 35b). He had been sent by the Seaboard White Citizens Council to see whether picket lines and demonstrations, which he said had been used successfully in Delaware to frustrate desegregation, could be used to coerce Clinton school officials to dismiss the Negro students from the high school (Appellant's App. 23a–24a, 27a–29a; Appellees' App. 15b, 24b, 26b, 29b, 30b, 44b–45b).

On Sunday, August 26th, petitioner met with members of the community to discuss his proposed course of action. The editor of the local paper and others explained to him that the high school had been desegregated in obedience to the District Court's order. Petitioner replied that it was not necessary to obey the court's ruling (Appellees' App. 16b–17b).

When school opened on Monday, August 27th, petitioner appeared on the high school grounds

(Appellees' App. 10b). Picketing and demonstrations around the school began (Appellees' App. 9b). They were to continue throughout the week (Appellees' App. 9b–10b, 20b–21b).

On Tuesday, August 28th, petitioner, at the head of a crowd of sympathizers, called on Principal Brittain and informed him that he should dismiss the Negroes from the school or resign. Mr. Brittain explained that he was acting in obedience to the District Court's order and that, even if he resigned, his successor would be subject to that order. Petitioner was not satisfied with this and told Mr. Brittain: "If you keep this up, there is going to be bloodshed" (Appellees' App. 15b).

On Wednesday morning, August 29th, respondents Lewallen and Davis, who were attorneys for Anderson County in the desegregation suit, met with petitioner in front of the high school to discuss the situation. As they stood in the center of a noisy and increasingly hostile crowd, Mr. Lewallen, speaking as an attorney, carefully explained the desegregation suit to petitioner and told him of the District Court's order. Again, petitioner stated that the order could be disregarded (Appellees' App. 25b–29b).

By August 29, after three days of picketing and demonstrations, the atmosphere in Clinton was pervaded by fear, tension, and anxiety. Demonstrators milled about the town on foot and in automobiles, shouting, honking horns and flaunting signs bearing insulting legends (Appellees' App. 5b, 21b, 25b). Teenagers in a crowd led by petitioner were seen carrying clubs (Appellees' App. 28b). One of the

Negro students had actually been attacked (Appellees' App. 13b–14b). The crowd before the high school had become so threatening that the husbands of women who taught there feared for their safety (Appellees' App. 30b).

The temporary restraining order against petitioner:—On Wednesday, August 29, 1956, respondents petitioned the District Court for injunctive relief. In their verified petition, they alleged that petifioner, with full knowledge of the District Court's desegregation order, had organized a movement to impede, obstruct, and intimidate the defendants in the desegregation suit from complying with the District Court's order, and that petitioner was leading a movement to intimidate parents of both races from sending their children to Clinton High School. A description of the picket lines and crowds which had congregated near the high school was set forth. Respondents prayed for an injunction enjoining petitioner and others from doing any act to obstruct or to impede by intimidation or oppression respondents' efforts to comply with the order of the District Court (Appellant's App. 4a).

On the same day, August 29, the District Court issued an *ex parte* temporary restraining order "prohibiting appellant and others from further hindering, obstructing, or in any way interfering with the carrying out of the aforesaid order of this Court, or from picketing Clinton High School, either by words or acts or otherwise'" (Appellant's App. 9a–11a). It further provided that appellant was to appear on the

following day to show cause why a preliminary injunction should not issue (Appellant's App. 10a).

The temporary restraining order was served on petitioner on the evening of August 29th as he was addressing a crowd of 1,000 to 1,500 persons gathered before the Clinton courthouse. The United States Marshal called petitioner aside and read the restraining order to him. The marshal began to read the petition which accompanied the order but was interrupted when petitioner took the papers and returned to his place before the crowd (Appellees' App. 54b–62b). He thereupon began an impassioned speech to the effect that he had been served with an injunction, that this injunction did not mean anything, and that persons not named in the order should continue to do what they had been doing until the fight was won (Appellant's App. 28a; Appellees' App. 55b; 62b; 66b).

The proceedings in the District Court:—After this speech, respondents immediately applied for an order of attachment charging that petitioner's speech was a willful violation of the restraining order which constituted a criminal contempt (Appellant's App. 15a–17a). The District Court issued an attachment order on August 30, 1956. Petitioner appeared before the court with his counsel on the same day (Appellant's App. 21a).

The court explained to petitioner and his attorney that the hearing on the issuance of the preliminary injunction would be held at that time but that they could have a continuance on the criminal contempt charge if they desired (Appellant's App. 21a–22a;

Appellees' App. 1b–3b). Counsel for petitioner indicated that he would prefer to have time to prepare a defense to the contempt charge and the court proceeded to conduct a hearing on the preliminary injunction (Appellant's App. 22a; Appellees' App. 1b–3b). During this proceeding, counsel for petitioner apparently changed his mind and at his express request the hearing on the issuance of the preliminary injunction and the contempt proceeding were conducted at the same time (Appellant's App. 22a; Appellees' App. 39b–41b). The United States Attorney participated in this hearing, at the request of the District Court, and, without objection by petitioner, interrogated witnesses (Appellees' App. 53b). Jury trial was not requested by petitioner.

At the conclusion of the hearing, the court held that the restraining order had been properly issued, that it did not violate the First Amendment, and that the evidence justified its continuance as a temporary injunction (Appellant's App. 21a–27a). The court also held that petitioner had willfully violated the temporary restraining order, that his conduct was not protected by the First Amendment, and that he was therefore guilty of a criminal contempt as defined by 18 U. S. C. § 401 (3) (Appellant's App. 24a–29a). A sentence of imprisonment for one year was imposed upon him. (Appellant's App. 29a).

By the end of the week, the movement launched by petitioner had gained such momentum that violence became rampant in Clinton (Appellees' App. 74b–88b). A mob estimated at 3,000 people formed (Appellees' App. 77b). Local police officials and persons depu-

tized to meet the emergency clashed with the mob (Appellees' App. 78b–79b), but they were unable to control it even with the use of tear gas (Appellees' App. 78b–79b). Late Saturday, the State Patrol entered the town to restore order, and a National Guard force of 667 men arrived the following day (Appellees' App. 80b–83b). Disorder continued and at one point the Guard had to use fixed bayonets to control the rioters (Appellees' App. 87b). Finally, the National Guard Commander was able to lay down and enforce stringent rules against assembly, and thus to restore order (Appellees' App. 82b–83b, 87b).

After a further hearing before the District Court, on September 6, 1957, the injunction against petitioner was made permanent, his motion for a new trial was overruled, and his bail was fixed at $10,000 (Appellant's App. 31a–34a).

The proceedings in the Court of Appeals.—Petitioner appealed to the Court of Appeals for the Sixth Circuit from his contempt conviction, the order making the preliminary injunction permanent, and the denial of his motion for a new trial. The Court of Appeals affirmed the judgment of the District Court in an opinion which reviewed the entire controversy from the standpoint of petitioner's conviction for contempt. It held that the District Court had jurisdiction to implement and protect its decree ordering desegregation (on the authority of *Brown* v. *Board of Education*, 349 U. S. 294, and *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91, 98 (C. A. 8)); that petitioner's speech, which was calculated to cause immediate action in violation of law, was not protected under

the First Amendment (citing *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502; *Feiner* v. *New York*, 340 U. S. 315; *Beauharnais* v. *Illinois*, 343 U. S. 250; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568), especially since there was a clear and present danger that the illegal result might be accomplished (citing *Dennis* v. *United States*, 341 U. S. 494). The court rejected as unsupported by the record petitioner's claim that he was not served. It also rejected his argument that the federal court was interfering with state functions by issuing orders to vindicate its own authority. The sentence imposed by the District Court was sustained against petitioner's argument that it constituted a cruel and unusual punishment. Finally, the court below held that an injunction must be obeyed "however it may seemingly be challenged as invalid," citing *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293. A petition for rehearing was denied on June 27, 1957.

ARGUMENT

Despite the dramatic background out of which it arose, this case involves, at bottom, no more than the application of settled principles in the administration of justice. The District Court issued a temporary restraining order, which ultimately was made a permanent injunction, for the purpose of protecting one of its decrees from frustration by the deliberate efforts of petitioner. In wilful disobedience of the court's order, petitioner incited mob action immediately aimed at subverting the court's decree. For this flagrant disobedience of the restraining order, he has

been sentenced, after due notice and hearing, to a term in jail for contempt in accordance with the prevailing usages of law. 18 U. S. C. 401 (3).

While occasions in which a District Court must thus use its inherent powers to enforce its orders are infrequent in our society, they are not unfamiliar to this Court. The facts in this record fall within this familiar pattern of prior law. They do not support petitioner's claim that the First Amendment prevents the District Courts from restraining or punishing calculated attempts to coerce disobedience to their valid decrees; or his claim that the District Court had no jurisdiction to act against him in these circumstances. No conflict with prior decisions of this Court or of other Courts of Appeals is presented. There is no occasion for further review.

1. Petitioner contends that the temporary restraining order, and the permanent injunction which embodies the same language, restrict rights of free speech guaranteed him by the First Amendment. The question which he thus raises involves primarily a factual inquiry into the record of petitioner's activities—a record already carefully reviewed by the Court of Appeals.

By Wednesday, August 29, 1956, the effectiveness of the District Court's decree of January 4, 1956, hung upon the strength of the respondent school officials to resist the intimidation petitioner had organized. They were faced with the threat of mounting disorder in their community and with threats to themselves for refusing to disobey the court's order. They had to consider the safety of the children, both white and

Negro, who were being forced to run through lines of pickets to go to and from school (Appellees' App. 13b–14b, 89b–91b). There was a clear and present danger that, without the aid of the court which had ordered them to desegregate Clinton High School, the school officials might be forced to disobey its order.

On this record, we submit that it is idle to suggest that the First Amendment barred the court from restraining petitioner's efforts to frustrate its desegregation decree. In plain language, petitioner was ordered to desist from "hindering, obstructing, or in anywise interfering" [with the implementation of the District Court's order to the respondent school officials to desegregate the high school in Anderson County] "or from picketing Clinton High School, either by words or acts or otherwise" (Appellant's App. 10a). This careful language restrained only behavior and expression which was deliberately aimed at the frustration of the District Court's decree. Petitioner was barred from exhorting the mob (which he had aroused) to picket, to demonstrate, and to boycott, until school officials subject to the District Court's decree were intimidated into violating it by dismissing the Negro students from Clinton High School. Yet this is what petitioner continued to do.

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 439." *Schenck v. United States*, 249 U. S. 47, 52. Petitioner's activities

in Clinton were, as he frankly stated, for the purpose of organizing demonstrations and boycotts to prevent desegregation in Clinton High School (Appellees' App. 11b, 17b, 35b). Backed by the movement he had organized, his words took on the character of force as strong as any call to strife ever condemned by this Court. His impassioned speech, after he had been served with the restraining order, urging the mob to continue coercing the respondent school officials until the fight was won (Appellees' App. 66b), was precisely the kind of unprotected speech referred to in *Schenck*. Exhorting a mob to a campaign of civil disobedience and of conflict, aimed at obstructing the decree of the court, is no more within First Amendment safeguards than are other direct incitements to racial or religious strife (cf. *Feiner* v. *New York*, 340 U. S. 315; *Beauharnais* v. *Illinois*, 343 U. S. 250; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568). Such behavior, which incites to immediate action aimed at the direct frustration or subversion of the lawful processes of Government, is beyond the limits of free speech recognized in this Court's decisions. Cf. *Dennis* v. *United States*, 341 U. S. 494; *Yates, et al.* v. *United States*, 354 U. S. 298.

The use of the injunctive process to control such expression is a familiar exercise of equity jurisdiction. Injunctions have been used to restrain picketing tainted by violence (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294–295) or aimed at coercing others to do some illegal act (*International Brotherhood of Teamsters, Local 695* v. *Vogt*, 354 U. S. 284; *Giboney* v. *Empire Storage Co.*, 336

U. S. 490). As the court below noted, "the speech here enjoined was clearly calculated to cause a violation of law * * * (Pet. App. 6a–7a).[1] In the atmosphere of tension which had been largely created by petitioner's efforts, his intemperate language took on the color of violence directly aimed at the obstruction of the District Court's decree. Remarks attacking this Court, which might otherwise be protected (cf. *Pennekamp* v. *Florida*, 328 U. S. 331; *Bridges* v. *California*, 314 U. S. 252), became part and parcel of petitioner's call to his followers to disregard the law until every Negro child was driven from Clinton High School. His denunciations were infected by the "momentum of fear" generated in Clinton by the mob at whose head petitioner had placed himself. In these circumstances, his inflammatory utterances necessarily became subject to restraint. Cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294.

2. Petitioner likewise contends that his conviction for contempt and the permanent injunction must fall because the District Court had no jurisdiction of the subject matter or of his person. The grounds upon which he would have this Court review these contentions are not clear from his petition. The record is clear, however, that the District Court was acting within its jurisdiction to protect its decree and that it

[1] Petitioner's complaint that his words are being improperly weighed against the sum total of the activities in Clinton which were hostile to integration will not withstand examination. His words were responsible, in themselves, for a substantial part of the sum total; and, also, his words defying the temporary restraining order must be evaluated in the immediate context in which they were spoken.

had properly acquired personal jurisdiction over the petitioner:

"(a) In fashioning its instructions for the disposition of the desegregation cases in *Brown* v. *Board of Education, et al.*, 347 U. S. 483, 495–496, this Court cautioned the lower courts to retain jurisdiction during the period of transition. 349 U. S. 294, 301. It recognized that difficulties of social and administrative adjustment required a cautious approach attuned to the delicacy of the issues. But it made clear that the 'vitality of these constitutional principles [underlying the admission of children to public schools on a nondiscriminatory basis] cannot be allowed to yield simply because of disagreement with them.' 349 U. S. 294, 300.

The judgments challenged here are simply applications of this Court's directive. The District Court was required, in the case before it, to end discrimination in Clinton High School. Petitioner's activities forced the court to exercise its jurisdiction in aid of this objective by preventing interference with respondents' efforts to eliminate discrimination. There is no color to his contention that the District Court did not have jurisdiction of the general subject matter. *See Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C. A. 8). Moreover, no subject is more obviously within the jurisdiction of the District Courts than the protection of their own decrees. This is the very essence of the grant of power to the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions * * *." 28 U. S. C. 1651 (a). *See Local Loan Co.* v. *Hunt*, 292

U. S. 234, 239. Without such power this Court's mandate in the *Brown* case, *supra*, would be impossible of implementation. The District Courts might be forced to stand by in impotence while constitutional rights which the courts had tried to vindicate were destroyed by demagogues and mobs. The assumptions as to the equitable power of the District Courts which underlie this Court's ruling in *Brown* demonstrate both the technical and the practical reasons why petitioner's contentions have no merit.[1]

(*b*) Equally without substance is petitioner's assertion that the District Court did not have personal jurisdiction over him. The record plainly shows that he was properly served within the territorial jurisdiction of the District Court. The marshal actually read the restraining order to him. *Supra*, p. 6.

(*c*) Since the District Court thus had jurisdiction of the subject matter and of petitioner's person, he is foreclosed from challenging his contempt conviction upon the ground that the court was exceeding its equitable jurisdiction. *United States* v. *United*

[1] Petitioner also urges this court to review his contention that the District Court did not have jurisdiction of the subject matter because it was attempting to extend federal jurisdiction into an area reserved to the police power of the states (Pet. 14). But the language of the District Court's order shows plainly that it restrained only deliberate interference with its desegregation decree. Further, a District Court need not await state police action to protect a federal function from unlawful interference. *In re Debs*, 158 U. S. 564.

We pass over as frivolous petitioner's suggestion that *Brown* v. *Board of Education, et al.*, 347 U. S. 483, is in error because the 14th Amendment may be enforced only by Congress (Pet. 16).

Mine Workers, 330 U. S. 293; *United States* v. *Shipp,* 203 U. S. 563; *Howat* v. *Kansas,* 258 U. S. 181, 189. And, in the light of the considerations set forth above, there is also no basis for further review of his contention that the District Court could not issue a permanent injunction to restrain him from interfering with its desegregation decree.

3. Petitioner's challenge to the procedures in his case is both unclear and insubstantial. He finds an issue in the fact that he was not served with a copy of the decree he was restrained from obstructing. However, the restraining order contained a sufficient description of the court's decree to make it clear to petitioner that by organizing a campaign to reestablish discrimination in Clinton High School he was campaigning to compel a violation of the District Court's order ending such discrimination (Appellant's App. 9a–11a). Further, the record shows that on three separate occasions prior to the issuance of the temporary restraining order the decree ending discrimination in Clinton High School was brought to petitioner's attention—on one such occasion it was even explained to him by an attorney for the school board (Appellees' App. 11b, 17b, 28b–29b). The District Court found on ample evidence that petitioner had actual notice of the desegregation decree. In these circumstances, there was no prejudice.

Nor is a basis for review presented by the fact that the proceedings against petitioner were initiated by persons bound by the District Court's desegregation decree, rather than by the Federal Government. Private persons have frequently initiated criminal con-

tempt proceedings. *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Matter of Christenson Engineering Co.*, 194 U. S. 458; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324. Equally unsubstantial is his objection to the appearance, in the Court of Appeals, of attorneys for the Government. Though criminal contempt may be prosecuted by private persons, it is also an offense against the United States (Pet. 13). The United States Attorney participated in the contempt proceedings at the request of the District Court without objection by petitioner (Appellees' App. 53b).

Petitioner complains that he did not have an adequate opportunity to prepare his defense.[5] The record shows, however, that he was offered a continuance on the contempt charge (Appellees' App. 1b). A hearing on whether a preliminary injunction should issue went forward upon the understanding that the contempt proceeding would take place at a later time. But after a further discussion with the District Court, petitioner expressly requested the court to hear the criminal contempt proceeding and the preliminary injunction motion together (Appellees' App. 40b–41b). *Supra*, pp. 6–7. In the face of this history, there is nothing to the point that the matter should have been continued. Petitioner was fully apprised by the order of attachment, of the criminal nature of the charge

[5] Insofar as this complaint is addressed to the court's denial of a continuance on the preliminary injunction hearing, it is moot since the preliminary injunction was superseded by the permanent injunction issued after a further hearing on September 6, 1956 (Appellant's App. 31a).

against him and the specific allegations on which it was based (Appellant's App. 15a). He was offered an adequate opportunity to prepare his defense and to present witnesses in his own behalf (Appellees' App. 34b, 97b). Having requested the procedure which was followed, he cannot complain now that the civil and criminal aspects of his case were tried together. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 300.[6]

4. The sentence of confinement imposed upon petitioner was an appropriate exercise of the district judge's discretion in the light of petitioner's "willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future." *United States* v. *United Mine Workers*, 330 U. S. 258, 303. Sentences of equal or greater severity have been affirmed. *E. g.*, *Hill* v. *United States ex rel. Weiner*, 300 U. S. 105; *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied, 348 U. S. 841; *United States* v. *Ledever*, 140 F. 2d 136 (C. A. 7), certiorari denied, 322 U. S. 734; *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8), certiorari denied, 242 U. S. 646; *Warring* v. *Huff*, 122 F. 2d 641 (C. A. D. C.) certiorari denied, 314 U. S. 678. Disrespect for the due processes of the law had been a

[6] Petitioner did not demand a jury trial in the District Court, and apparently concedes that there is no statute authorizing such a trial on the averments contained in the order of attachment (Pet. 10).

central theme of petitioner's campaign. His harangue in defiance of the temporary restraining order was aimed at furthering this purpose. In these circumstances, we submit that, far from abusing its discretion, the District Court showed restraint. Considering his conduct and its consequences, petitioner's sentence of one year is not an undue sanction to vindicate the public interest in obedience to lawful procedures.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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